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Citation for published version:

Gilmore, W 2000, 'Drug Trafficking at Sea: The Case of *R. v. Charrington and Others*', *International and Comparative Law Quarterly*, vol. 49, pp. 477-89. <https://doi.org/10.1017/S0020589300064253>

Digital Object Identifier (DOI):

[10.1017/S0020589300064253](https://doi.org/10.1017/S0020589300064253)

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Publisher's PDF, also known as Version of record

Published In:

International and Comparative Law Quarterly

Publisher Rights Statement:

©Gilmore, W. (2000). Drug Trafficking at Sea: The Case of *R. v. Charrington and Others*. *International and Comparative Law Quarterly*, 49, 477-89. doi: 10.1017/S0020589300064253

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CURRENT DEVELOPMENTS

PUBLIC INTERNATIONAL LAW

Edited by Colin Warbrick and Dominic McGoldrick*

I. Drug Trafficking at Sea: The Case of *R. v. Charrington and Others*

I. DRUG TRAFFICKING AT SEA: THE CASE OF *R. v. CHARRINGTON AND OTHERS*

A. *The Context*

IN 1991 the United Kingdom became a Party to the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, one of the purposes of which is "to improve international co-operation in the suppression of illicit traffic by sea".¹ Article 17 of that Convention has, as its central purpose, the establishment of international standards, procedures and practices designed to facilitate the obtaining of enforcement jurisdiction whereas Article 4 addresses the closely associated issue of prescriptive jurisdiction.² The Criminal Justice (International Co-operation) Act 1999 contains a number of provisions of relevance in this latter context. These include the taking of extraterritorial jurisdiction over certain drugs offences taking place on board the vessels of other Convention parties.³

As United Kingdom practice has developed in this area the courts have been provided with several opportunities to explore the nature and limits of both the Convention and the implementing legislation.⁴ One such instance was the 1999 case of *Regina v. Charrington and others*.⁵ This arose out of the boarding of a Maltese registered merchantman, *The Simon de Danser*, on 5 May 1997. This was a covert operation carried out in darkness by members of the Royal Marines Special Boat Squadron, accompanied by officers from HM Customs and Excise. The boarding party, which used rigid inflatable boats for this purpose, was dispatched from a British warship, HMS *York*.⁶ At the relevant time, *The Simon de Danser* was in international waters some 100 miles off the coast of mainland Portugal. Four tonnes of cannabis with an estimated street value of £14.5 million

* This section deals with recent developments in British practice making some attempt to set the practice against the international and domestic context in which it takes place.

1. Preamble. The text is reproduced in (1989) 28 I.L.M. pp.497 *et. seq.*

2. See Art.4(1)(b)(ii).

3. 1990, c.5 (UK). See ss.19–21 and Sched.3. See also the Criminal Justice Act 1993, c.36 (UK), s.23.

4. See e.g. *Dean and Bolden* [1998] 2 Cr.App.R. 171 where the Court of Appeal subjected Art.17 to a somewhat controversial interpretation.

5. Unreported. But see *Real-Time Transcription of the Stenographic Notes* [hereafter Transcript], Day 18, pp.1018–1051.

6. See e.g. Transcript, Day 9, p.324, and Day 15, p.784.

was found on board.⁷ A number of individuals were arrested and brought to the United Kingdom. As has been pointed out elsewhere they "were charged under Section 1(1) of the Criminal Law Act 1977 and Section 170 of the Customs and Excise Management Act 1979 with offences relating to conspiracy fraudulently to evade the prohibition on the importation of drugs".⁸

The trial commenced at Bristol Crown Court in January 1999 before His Honour Judge Foley. Counsel for the defence submitted "that the proceedings ought to be stayed as an abuse of the process of the court on the grounds that the boarding, search and seizure . . . was unlawful, as was the subsequent taking of the boat to the United Kingdom".⁹ After extensive argument, lasting several weeks, Judge Foley granted a stay on 4 February 1999: the same day as the Court of Appeal handed down its judgment on abuse of process in the case of *Regina v. Mullen*.¹⁰ In doing so he remarked: "It gives me no pleasure, the case of stay is overwhelming, there was *mala fides* here".¹¹

The failure of the prosecution in these circumstances¹² prompted the Commissioners of Customs and Excise to commission a former Treasury Solicitor, Sir Gerald Hosker, to conduct an independent inquiry into the Customs aspects of this operation and its aftermath. His report, consisting of analysis, conclusions and recommendations, was completed in the summer of 1999.¹³

Both the judgment of Judge Foley and the Hosker Report address a number of issues of interest to international lawyers, some of which are considered below. They relate primarily to the manner in which the consent of Malta, which was also a Party to the 1988 Convention,¹⁴ was obtained and the circumstances in which the boarding of *The Simon de Danser* was accomplished.

B. International Law Issues

1. The Authorisation by Malta

It will be recalled that, in so far as it relates to law enforcement action against foreign vessels in international waters, Article 17 of the 1988 Convention establishes a framework through which the consent of the flag state can be sought

7. See HM Customs & Excise, News Release of 11 Feb. 1999 entitled "Operation Teak: Independent Inquiry".

8. *Inquiry into HM Customs and Excise Aspects of The Simon de Danser Case: Report by Sir Gerald Hosker KCB QC* (1999) [hereafter Report], para.1. It is unclear why those on board were not charged under s.19(2) of the 1990 Act under which there is no requirement to prove that the drugs were bound for the UK. See e.g. *R. v. Wagenarr*; *R. v. Pronk* (1996) Times Law Reports 402. Efforts by the Crown to amend the indictment to this effect failed. See Report, para.5. Consequently the issue of the intended destination of the ship assumed major importance. See e.g. Transcript, Day 18, pp.1018, 1022, 1031 and 1051.

9. Transcript, Day 18, p.1018.

10. Subject to analysis in this issue at pp.489-496.

11. Transcript, Day 18, p.1051.

12. It was also the subject of much media interest. See e.g. *The Times* (London) 5 Feb. 1999, p.3, and *The Sunday Telegraph* (London) 17 May 1998, p.13.

13. See *supra* n.8.

14. By accession in Feb. 1996.

and obtained.¹⁵ That such consent is a precondition to lawful action is further reinforced by the terms of Article 4(1)(b)(ii).¹⁶ In order to facilitate this process paragraph 7 of Article 17 requires each Party to designate an authority to receive and respond to requests. As has been pointed out elsewhere: "This essential contact information, including addresses, telephone and facsimile numbers, and hours of operation, is published by the United Nations and updated on a periodic basis".¹⁷ In the relevant publication governments are urged to review the information and to communicate any changes to the UN International Drug Control Programme in Vienna.¹⁸

In April of 1997 the relatively junior functionary in HM Customs and Excise who was entrusted with the task of communicating the formal British request appears to have first attempted to contact the authority listed in this UN publication. This having proved to be unsuccessful the official then approached the Director of the National Drugs Intelligence Unit in Malta, rather than UNDCP in Vienna, for guidance.¹⁹ In evidence at Bristol Crown Court the Director of that Unit testified as follows: "... I told him as far as I knew it was the Attorney-General who could give that authority, or else it could be also the Malta Maritime Authority. But I suggested to him that he contacts first the Attorney-General".²⁰

What took place thereafter was to assume critical importance in the subsequent legal proceedings in England. In essence the British official claimed that he had telephoned the office of the Attorney-General of Malta and had been advised to refer the matter to the maritime authority. Unfortunately he was unable to produce evidence to the satisfaction of the Court that such contact had been made. Indeed, Judge Foley was forced to the conclusion that "it is likely that he was being untruthful there".²¹ Similarly the Hosker Inquiry was unable to endorse the official's account.²² It is accepted that he then sought and obtained the authorisation of the Executive Director of the Malta Maritime Authority for the operation against *The Simon de Danser* to take place.²³

In the event it transpired that the appropriate authority under the laws of Malta for Article 17 purposes was the Attorney-General who, in granting consent, was in turn obliged to act in consultation with the Prime Minister.²⁴ It was submitted by the defence that the boarding having been authorised by an inappropriate authority was consequently unlawful;²⁵ a view which seems to have been favoured,

15. See generally, United Nations, *Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988* (1998) [hereafter *Commentary*], at pp.323-345.

16. Similarly s.20(2)(b) of the 1990 UK Act, as amended, requires the authorisation of the UK.

17. *Commentary*, p.335.

18. See United Nations, *Competent National Authorities under the International Drug Control Treaties* (1995), at p.89.

19. The agency listed had become defunct.

20. Transcript, Day 12, p.602.

21. Transcript, Day 18, p.1024.

22. See Report, para.18.

23. See e.g. *idem*, at paras.13-14.

24. See e.g. Transcript, Day 9, p.319.

25. See e.g. Transcript, Day 15, p.829.

albeit implicitly, by the Judge.²⁶ It is suggested, however, that as a matter of international law such a conclusion is by no means self-evident.

It is both apt and instructive to refer to the restrictions contained in the law of treaties²⁷ concerning the ability to invoke provisions of internal law as a basis for the invalidation of consent.²⁸ Under Article 46 of the Vienna Convention on the Law of Treaties a State may contest the validity of a treaty on the ground that it was concluded in violation of a provision of its internal law regarding competence to conclude treaties. However, this right is subject to the satisfaction of certain specified and exacting criteria; namely, that the rule of internal law must be of fundamental importance, and the violation must be manifest.²⁹ The latter condition is satisfied "if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith".³⁰

Turning to the case in hand it is by no means clear that the statutory rules in question were ones of fundamental importance. Even if they could be so classified significant doubt must exist that there was any manifest violation thereof. Indeed, both the Attorney-General and the Executive Director of the Malta Maritime Authority appeared as witnesses for the Crown and argued that, as a matter of domestic law, valid authority had in fact been granted in this instance.³¹ Notwithstanding the fact that this interpretation of the law of Malta was not accepted by Judge Foley³² it must be doubted, in the circumstances, if the manifest violation threshold could be said to have been satisfied. A safer conclusion would be that it was legally satisfactory for the United Kingdom to rely on the ostensible authority of the Malta Maritime Authority in providing consent.

2. *The contents of the British request*

Considerable attention was devoted in the Court proceedings in Bristol to the wording of the British request for authorisation which was submitted to Malta and consented to by it on 11 April 1997.³³ It contains the following passage: "The vessel SIMON DE DANSER is currently exercising freedom of navigation in accordance with international law off the coast of the United Kingdom, flying the Maltese flag".³⁴

26. See generally, *supra* n.5.

27. See Vienna Convention on the Law of Treaties, Art.2(1)(a). The framework provided by Art.17(3) and (4) is clearly intended to result in the creation of relationships between States governed by international law. See e.g. *supra* nn.15 and 16 and related text. Note that under para.6 the flag state may subject its authorisation to conditions. For a view of the nature of the resulting relationship see e.g. Commentary, at p.338. For US judicial authority that even an *ad hoc* consent from a flag state prior to the conclusion of the 1988 Convention fell within the treaties exception to exclusive flag state jurisdiction contained in Art.6(1) of the 1958 Geneva Convention on the High Seas, see e.g. *US v. Green* 671 F.2d 46 (1982), at 50-51. But see *supra* n.4, at pp.182-183.

28. See, e.g., R. Jennings and A. Watts (eds.), *Oppenheim's International Law* (9th ed.: 1992), Vol. 1, pp. 1285-1288.

29. See e.g. (1966) *Yearbook of the International Law Commission*, Vol.II, at pp.240-242.

30. Vienna Convention, Art.46(2).

31. See e.g. Transcript, Day 11, p.484.

32. See Transcript, Day 18, p.1031.

33. See Report, paras. 9 and 14.

34. Reproduced *idem*, at para.10.

It later transpired, however, that the vessel had been in Funchal harbour Madeira at the time of the request. In this regard, it is of relevance to note that the Hosker Committee was satisfied that Customs officials remained unaware of the true location of the vessel until the day after receipt of the Maltese authorisation.³⁵ There it remained until 24 April during which time the authorities of the flag state were not provided with information as to its correct location.³⁶ However, on 25 April, when the vessel was again in international waters, HM Customs and Excise advised the Malta Maritime Authority that there had been a delay and sought and received confirmation that the original authorisation was still valid.³⁷ No details as to the location of the vessel during the intervening period or as to its then position were either sought by Malta or provided to it.³⁸

Much was made of the above by Counsel for the defence. In particular, it was submitted that the boarding and subsequent acts of the British authorities were unlawful because the consent of Malta was obtained through the provision of materially inaccurate information which was, thereafter, deliberately left uncorrected.³⁹ The position of the Crown, by contrast, was to explain that the wording used was from a standard form or template⁴⁰ (which had been originally drafted with the use of Customs cutters operating relatively close to the United Kingdom in mind).⁴¹ While the officials concerned had failed to amend the wording of the standard form to reflect the factual circumstances of the case there had been no intention to mislead Malta. Similarly, there had been no prejudice to its position since the intention was clear throughout that the operation was to be undertaken in international waters.⁴² Counsel submitted that these should be regarded as mere technical irregularities.⁴³

In seeking to assess the significance of this matter in international law terms it should be recalled that Article 17 says very little about either the manner in which a request is to be made or as to the contents of a request. As the *UN Commentary* to the 1988 Convention remarks: "As far as the sufficiency of information is concerned, Article 17 is silent as to the procedural and other general rules that are to govern such requests. Consequently, decisions will have to be taken on a range of matters, including the required form of requests, the language or languages in which requests must be formulated and, an issue of particular importance, the

35. See *idem*, para.21.

36. See e.g. Transcript, Day 18, p.1026.

37. See Report, para.33.

38. See *idem*, paras.34-36.

39. See Transcript, Day 18, p.1021. A further issue raised by the defence was whether a request under Art.17 could properly be made when the vessel was not in international waters. This point was conceded by the Crown. See e.g. Transcript, Day 17, p.966. The present writer provided the Hosker inquiry with a contrary view; namely, that properly construed Art.17 did not preclude the making of a request when the target vessel was in the territorial sea or internal waters of a State but that the same Art. only envisaged action pursuant to authorisation being taken in international waters. See Report, para.29.

40. See e.g. Transcript, Day 18, p.1028. For an instance in which similar wording was utilised see *supra* n.4, at p.174.

41. See Report, para.20(1).

42. See e.g. Transcript, Day 10, p.458.

43. See *idem*, Day 18, p.1028.

types of information each request should contain".⁴⁴ While consideration has been given within the UN system to the formulation of a standard list of matters to be addressed in such requests⁴⁵ its use is not legally required. Consequently parties to the Convention remain free to fashion their individual requirements in respect of such procedural matters as they see fit. In the end result, it is for the requested State to determine the sufficiency of the information with which it has been provided in any particular case.

Such issues are, however, subject to detailed treatment in the text of the 1995 Council of Europe Agreement on Illicit Traffic by Sea implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.⁴⁶ This initiative was authorised by Article 17(9) of the 1988 text which called upon States to "consider entering into bilateral or regional agreements or arrangements to carry out, or to enhance the effectiveness of, the provisions of this article".

In the course of argument the defence sought to place reliance on this latter instrument which has been signed but not ratified by the United Kingdom. It had not entered into force.⁴⁷ In this regard the defence invoked an expert report on matters of international law.⁴⁸ Paragraph 8 of that text is worded thus:

Britain has signed but not yet ratified the *Council of Europe Agreement on Illicit Traffic by Sea* ("the Agreement"). Its purpose is to assist the implementation of Article 17 of the Vienna Convention and to clarify the necessary procedures. In signing that agreement (prior to May 1997) Britain agreed to be bound by its terms. Signing gives rise to the Public international law obligation not to act in a way inconsistent with the object and purpose of that agreement. This proposition is derived from basic principles of international co-operation and finds expression in the Vienna Convention on the Law of Treaties 1969, Article 18.

Article 21 of the agreement deals with the contents of requests to board. "Location" means what it says.⁴⁹

Although the opinion does not specify that the terms of Article 21 of the 1995 Agreement attract the protection of Article 18 of the Vienna Convention on the Law of Treaties it is consistent with such an interpretation. More importantly, the transcripts from *Regina v. Charrington and others* indicate that it was so construed by defence Counsel.⁵⁰

In examining this line of reasoning it is necessary to bear in mind the basis for this obligation in the law of treaties. As McDade reminds us: "Such interim obligations arise out of general international law because of the need to protect the agreement which has been negotiated so that when the time comes for ratification, parties may validly express their consent to be bound by the situation

44. Commentary, p.337.

45. See *idem*, at pp.337-338.

46. Published by the Council of Europe under the title *Agreement on Illicit Traffic by Sea implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and Explanatory Report* (1996).

47. It had, at the relevant time, been neither signed nor ratified by Malta.

48. Text kindly provided by HM Customs and Excise. Its terms were, with one minor modification, agreed with the Crown. See Transcript, Day 15, pp.751-752. It was positively viewed by the judge. See *idem*, Day 18, p.1040.

49. See also para.9 of the opinion.

50. See e.g. Transcript, Day 16, pp.876-879; and, Day 18, p.1044.

without fear that the bad faith of another party has removed the rationale of the agreement".⁵¹

Even if Article 21 of the 1995 Agreement can be regarded as forming part of its objects and purposes, a proposition which would be controversial,⁵² it is by no means obvious how an administrative practice which failed to reflect its terms (dealing with procedural matters) prior to its ratification and entry into force, could properly be characterised as falling within the contemplation of Article 18 of the Vienna Convention. That obligation is, it will be recalled, restricted to acts which would *defeat* the object and purpose of the treaty in question. Such an administrative practice would, for example, be easily capable of alteration to take account of the requirements of the 1995 Agreement when they became formally operative. Such a practice could not readily be regarded as rendering the treaty meaningless when it entered into force, or to have undermined or frustrated its potential application. There is, in short, no obvious prejudice either to the legal interests of the potential parties or to the integrity of the regime established by the 1995 Agreement.

While it follows that the United Kingdom was under no legal obligation to provide Malta with information as to the location of *The Simon de Danser* the fact of the matter is that the original request did contain such information.⁵³ As noted earlier it was described as "exercising freedom of navigation"⁵⁴ in waters "off the coast of the United Kingdom". Evidence given on behalf of the Crown sought to construe the latter in such a way as to encompass the *locus*.⁵⁵ Judge Foley was not impressed. He remarked: "The evidence [was] ... that the words 'off the coast of the United Kingdom' do not mean off the coast of the United Kingdom. The language of the court since birth has been English, it is the language used in our courts. With the greatest of respect ... I do not need any help at all to understand the meaning of those words ...".⁵⁶

At the time of the original request there was considerable confusion and uncertainty concerning the actual whereabouts of the vessel. In particular it appears that HM Customs was unaware that it was then in port in Madeira. In these circumstances it might be appropriate to classify the inaccuracies as constituting an innocent misrepresentation. However, at no stage did the British authorities inform Malta of the true facts concerning location when these became known. In terms of the English judicial proceedings this failure had, in the words of the Hosker Report, "disastrous consequences".⁵⁷

In subjecting this issue to analysis in terms of international law the starting point must be that a requested flag state is entitled to rely upon the information

51. P. McDade, "The Interim Obligation between Signature and Ratification of a Treaty" (1985) N.I.L.R. p.5, at pp.10-11. See also I. Sinclair, *The Vienna Convention on the Law of Treaties* (2nd ed.: 1984), at p.43.

52. See e.g. *supra* n.46, at pp.36-37 relating to Art.2 of the Agreement. For a more detailed summary of the views of the writer see Report, para.30.

53. See Report, para.31.

54. The parties agreed that para.2 of the expert opinion, *supra* n.48, correctly reflected the meaning of this terminology; namely, navigation upon the high seas and "within the vessel's exclusive economic zone". But see Commentary, at pp.326-328.

55. See e.g. Report, para.20(2).

56. Transcript, Day 18, p.1025.

57. Report, para.49.

provided by the requesting party and must be assumed to have done so. What then if, as in this case, it later transpires that the information was erroneous? Here again reference to the law of treaties is instructive. It will be recalled that Article 48 of the Vienna Convention permits a State to invoke an error as a basis for invalidity if, *inter alia*, it relates to a fact or situation which formed "an essential basis of its consent to be bound by the treaty".⁵⁸

While the specification of the location of the vessel at the time the request is made is not mandated by Article 17 such information may properly be regarded by the requested State as relevant or even critical to its decision on whether or not to authorise action. Unfortunately for the Crown the Attorney-General of Malta, in evidence, indicated that, as the designated authority, the issue of location was of importance in the exercise of his discretion in matters of this kind.⁵⁹ As Judge Foley observed:

So the Attorney-General wants, firstly, to see a threat. He wants to consult the authorities of the port before he goes any further. Of course, as we know, the ship was not off the coast of the United Kingdom. Now, if the request had said that the boat was in Funchal Harbour, the Attorney-General would have consulted with the Portuguese. If the request had said that the boat was 900 miles from Britain off the coast of Portugal, the Attorney-General, it is submitted, and I agree almost certainly, would not have perceived the level of threat required.⁶⁰

The "threat" to which the Attorney-General referred in his evidence was one directed at the requesting State. While the anticipated destination of a shipment of illicit drugs may, quite properly, be regarded as of relevance to the policy issue of whether or not to grant authorisation to a boarding in international waters it is of interest to note that no such nexus is required by Article 17. Consequently, under the 1988 Convention interdiction can properly take place where there is no evidence as to the final destination of the shipment or even when it is known that it is destined for illicit importation into a country other than the requesting State.

It seems fair to conclude, as did the Court, that the original request contained "blatantly misleading information".⁶¹ From the evidence of the Attorney-General it would also appear appropriate to classify the misrepresentation as being in respect of a matter which might well have formed "an essential basis" on which the consent of Malta was secured. Furthermore, the failure of the United Kingdom to inform Malta thereafter as to the true state of affairs loomed large in the conclusion of the Court that the entire operation was tainted by *mala fides*. Leaving to one side the consequences of such a conclusion in English law, it is suggested that the position in international terms is as follows: (1) the agreement procured was voidable;⁶² (2) Malta at no stage seems to have invoked the original error as to location as a basis for impeaching the validity of the agreement;⁶³ and (3) had it done so successfully the United Kingdom would have been in a position of considerable difficulty in seeking to rely on the protection afforded to acts

58. Vienna Convention, Art.48(1). See also *supra* n.29, at pp.243–244.

59. See e.g. Transcript, Day 12, at pp.543–544 and 570–571.

60. *Idem*, Day 18, p.1027.

61. *Idem*, at p.1028.

62. See Art.48, Vienna Convention on the Law of Treaties. See also *supra* n.29, at pp.243–244.

63. On the absence of an obligation to do so, see e.g. *supra* n.28, at p.1294.

performed in reliance on the agreement since this is restricted to those done in good faith.⁶⁴ The fact that in international law an error of this kind does not make an agreement automatically void does not, however, appear to have been in the contemplation of the Court.

3. *The boarding of the vessel*

In the course of argument it was submitted by the defence that the manner in which the boarding was effected also constituted a violation of the agreement with Malta and Article 17(10) of the 1988 Convention. The latter restricts the types of action which can be taken to "warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorised to that effect". The original request borrowed loosely from the wording of that provision. It indicated that the action would be taken by craft "identifiable as being on government service" and authorised to that effect. It contained no reference to warships and military aircraft.⁶⁵

It will be recalled that the boarding was effected, under cover of darkness, by unmarked rigid inflatable boats which had set off from HMS *York* which was located a considerable distance away from the target of the operation.⁶⁶ Perhaps surprisingly, given the fact that a warship was utilised, the focus of argument was on whether the United Kingdom had complied with the requirement that the ship taking action was "identifiable as being on government service".

It was contended by the defence that this requirement attached to the inflatable boats used by the boarding party.⁶⁷ The Crown, by contrast, argued that there had been no violation since any requirements attached to HMS *York* and not to the inflatable craft which had been launched from it.⁶⁸ While this matter did not feature as significantly in the case as the issues discussed earlier⁶⁹ it is worthy of consideration in this context.

The interpretation to be afforded to Article 17(10) is not fully resolved either by its wording or by its drafting history as revealed in the Official Records. In this regard it is relevant to note that the subject matter finds no reflection in the basic proposal on illicit traffic by sea which was initially before the Conference⁷⁰ and

64. See Vienna Convention on the Law of Treaties, Art.69(2). For the background see e.g. *supra* n.29, at pp.264–265. One defence Counsel raised the possibility of classifying the consent of Malta as having been procured by fraud. See Transcript, Day 15, p.808. In such cases the ground for invalidity must still be invoked. See Vienna Convention Art.49. However, the party whose fraud has occasioned the nullity may not rely on the good faith protection. See Art.69(3).

65. Reproduced in Report, para.10. Authorisation was also sought "[t]o use reasonable force, if necessary...". For a recent analysis of relevant international rules in this context see the 1 July 1999 judgment of the International Tribunal for the Law of the Sea in *The M/V "Saiga" (No. 2) Case, St Vincent and the Grenadines v. Guinea*, at paras.153–159. Reproduced in (1999) 38 I.L.M., at pp.1323 *et seq.*

66. See Transcript, Day 9, at p.324; and Day 15, at p.784.

67. See e.g. *idem*, Day 18, at pp.1042–1043.

68. See e.g. *idem*, Day 17, at p.966.

69. See Report, at para.45.

70. See *United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1991) [hereafter Official Records], Vol.I, at pp.154–155.

was introduced, by way of amendment, at the suggestion of the Federal Republic of Germany.⁷¹ The eventual wording was deliberately based on that of Article 107 and Article 111(5) of the 1982 Convention on the Law of the Sea⁷² dealing with ships and aircraft entitled to seize vessels on account of piracy and to exercise the right of hot pursuit. A similar provision is to be found in Article 110(5) governing the exercise of the right of visit.⁷³

Several issues arise for consideration. First, it is clear from the drafting history of the Law of the Sea Convention that the requirement that a vessel be "clearly marked and identifiable as being on government service" does not apply to warships or military aircraft. As one commentary has pointed out in relation to Article 107, this, "identifies two groups of ships and aircraft that are entitled to carry out seizures on account of piracy: (i) warships or military aircraft; and (ii) other ships or aircraft on government service. The second group must be 'clearly marked and identifiable as being on government service and authorized to that effect'".⁷⁴ The same conclusion flows from an examination of the specialist literature⁷⁵ and from an analysis of the treatment of the same issue in Article 110.⁷⁶ These provisions address issues previously covered in the 1958 Geneva Convention on the High Seas. The treatment is not, however, identical. In particular Article 22 on the right of visit was confined in the 1958 text to warships. In Articles 21 and 23(4), however, ships and aircraft "on government service and authorised to that effect" could, as with the 1982 Convention, also be used.⁷⁷ A further difference between the 1958 and 1982 Conventions is that the former contains no requirement that non-warships involved in relevant activities be clearly marked and identifiable as being on government service. The reasons for and significance of this change remain somewhat obscure. As one well respected academic commentary has remarked: "There is no indication in the Convention or elsewhere, so far as is known, of what is meant by that expression".⁷⁸ It is suggested, however, that the words used are intended to assist in indicating the official character of the craft in question and their personnel, and in helping where necessary in the allocation of State responsibility and liability.

The authorities also provide little assistance in resolving the difficult issue of whether the craft utilised by the boarding party must satisfy the same requirements as their "platform" or mother ship. Indeed, the evidence suggests that this

71. See *idem*, at p.156.

72. See Commentary, at p.333. See also Official Records, Vol.I, at p.157; and Vol.II, at pp.309-314.

73. For the similar approach taken in the Council of Europe Agreement see *supra* n.46, Art.11(2).

74. S. Nandan and S. Rosenne (Eds), *United Nations Convention on the Law of the Sea: A Commentary* (1995), Vol.III, p.221.

75. See e.g. B. Oxman, "The Regime of Warships Under the United Nations Convention on the Law of the Sea" (1984) 24 *Virginia Journal of International Law*, p.811, at p.827; and R. Reuland, "The Customary Right of Hot Pursuit onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention" (1993) 33 *Virginia Journal of International Law*, p.557, at pp.561-564.

76. See Art.110(1)(2) and (5). For the definition of "warship" see Art.29.

77. The latter also includes the use of the word "specially". See also, Reuland, *op. cit.*, at p.562.

78. *Supra* n.74, at p.222.

matter was not in the contemplation of the drafters of the various international conventions in question. That said, it should be noted that Article 110(2) envisages that in giving effect to the right of visit the warship "may send a boat under the command of an officer to the suspected ship". It contains no indication of special conditions to be satisfied by the boat utilised by a boarding party by way of identification or otherwise. The provision is thus consistent with an interpretation that the conditions of Article 110 fall to be satisfied by the "platform" or mother ship from which the boarding party has disembarked.

The final element which requires consideration is whether it makes any difference if the "platform" or mother ship is itself visible to the vessel to be boarded. Here again the authorities are largely silent and consequently determining the proper construction to be adopted is an exercise which is fraught with difficulty. The lack of assistance provided by the official records and other sources relevant to the 1958 and 1982 Conventions on the Law of the Sea may be explained, at least in part, by the differing circumstances in which the rights in question may, in practical terms, be utilised. For example, given the requirement of "a visual or auditory signal to stop . . . at a distance which enables it to be seen or heard by the foreign ship", there is little apparent scope for covert or secret boardings to be undertaken in hot pursuit operations.⁷⁹

By way of contrast, there are clear practical law enforcement considerations which may point towards the need for secret or covert boardings in circumstances where drug shipments are involved. These include reducing the risk that the evidence will be destroyed or that those on board will arm themselves. Given the context in which the 1988 Convention was negotiated and the emphasis which it places on law enforcement concerns, an interpretation of a provision (the meaning of which is self-evidently obscure) which would place a major practical barrier in the way of the execution of an authorised operation designed to suppress illicit traffic by sea should not lightly be arrived at.⁸⁰ It may be of interest to note that the recent UN *Maritime Drug Law Enforcement Training Guide*, formulated exclusively with Article 17 operations in mind, contains several references to secret boardings. In treating the issue of approaching suspect vessels it states:

In operations where the element of surprise is needed, the cutter must remain outside the visual range of the largest vessel, e.g., up to 20 nautical miles away. The ancillary boat can be directed by radar as well as using a global positioning system (GPS) and it should be fitted with a radar reflector.⁸¹

While the above factors tend to favour the view proffered by the Crown it is not difficult to formulate a plausible argument to the contrary. In essence this revolves around the fact that, in instances in which the warship or other government vessel is not visible, in the absence of any markings on the boat being used by the boarding party there would be no objective basis by which it could be identified as

79. Art.111(4). See also *The M/V "Saiga" (No. 2) Case*, *supra* n.65, at paras. 141, 147-148, and 152.

80. See also Art.2(2) of the 1995 Council of Europe Agreement, *supra* n.46.

81. IX, 2. The text was prepared by UNDCP and published by the UN in 1999. It is said, at p.xii, to be "based on the best practices of a number of countries which have built up considerable expertise in the area of maritime drug law enforcement".

having an official character. As one witness put it, in such circumstances "you might in certain parts of the world, assume you were about to be attacked. You might take the view that you needed to defend yourself, when, in fact, you didn't".⁸² Thus, in order to avoid rendering the provision meaningless in such circumstances the craft being utilised for the boarding must necessarily attract to itself the relevant requirements of the Conventions. While no clear conclusion appears in the judgment in *Regina v. Charrington* on this matter its overall tenor and thrust suggests that it is this latter line of reasoning which found favour with Judge Foley.⁸³

C. Conclusions

In giving his reasons for ordering a stay of proceedings on the ground of abuse of process the judge was highly critical of the manner in which this matter had been dealt with by the relevant British authorities. In his view "[t]his case has revealed a culture, a climate, of carelessness and recklessness..."⁸⁴ which had extended to a disregard for the rules and procedures of Maltese law, British law and international law alike.⁸⁵ The evidence had revealed a "catalogue of flawed procedures, misleading requests, illegalities and [in]competence at a number of levels".⁸⁶ These were, in his view, no mere technical irregularities.⁸⁷

While the above analysis demonstrates a state of affairs which was clearly unsatisfactory it has also suggested that considerable doubt must exist as to whether the "illegalities" to which reference is made can be properly said to flow from the international law issues which were before the court and, to the extent that they did, whether they were of an essentially technical character.

Fortunately, the recommendations of the Hosker Report, if effectively implemented, should go a long way towards ensuring that such a state of affairs does not recur. Three are of particular relevance for present purposes. The first relates to the procedures which should be followed in future in instances in which there is uncertainty as to the identity of the appropriate authority in the State of registry.⁸⁸ Second, it has been proposed that all future requests for authority to board foreign vessels "should be prepared or approved in writing by the Solicitor's Office before it is submitted to the appropriate authority in the flag state".⁸⁹ Finally, it recommends that the legal requirements flowing from Article 17(10) of the 1988 Convention on the marking of boats in such operations should be circulated to relevant Customs officers. This subject was seen to represent "a future basis for challenge by defence counsel".⁹⁰

Given the balance of competing arguments on this latter point, the high costs of launching such operations, and the considerable diplomatic embarrassment which would result from any successful court challenge, it might be prudent for

82. Transcript, Day 15, p.765.

83. See generally, *supra* n.5.

84. *Idem*, p.1051.

85. *Idem*.

86. *Idem*, p.1050.

87. See e.g. *idem*, at p.1037.

88. See Report, para.68(2).

89. *Idem*, para.68(1).

90. *Idem*, para.71.

action beyond that which is recommended to be given serious consideration. One obvious option would be to examine the possibility of marking such boarding craft if this could be accomplished in a manner which did not prejudice essential operational requirements. Alternatively the government could take the initiative in securing judicial clarification: a special reference under section 4 of the Judicial Committee Act 1833 would do nicely.

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INTERNATIONAL LAW

Edited by Colin Warbrick

II. Judicial Jurisdiction and Abuse of Process

JUDICIAL JURISDICTION AND ABUSE OF PROCESS

BRITISH cases used to be widely relied upon to show that courts were entitled to hear criminal proceedings against defendants brought before them without having to enquire into the process by which custody over them had been obtained: and specifically, that there was no bar to proceeding where the allegation was made that custody had been obtained in breach of international law.¹ The consistency of the doctrine was breached by *Mackeson*² when the English court refused to hear the case against a defendant who, it accepted, had been brought to England by a collusive process between the English and Zimbabwean authorities, which arguably breached both national laws, even if it did not involve a breach of international law. While the previous orthodoxy soon reasserted itself in *Driver*,³ the edifice of authority was substantially undermined in *Bennett*,⁴ when the House of Lords acceded to the claim of the applicant that proceedings against him would be an abuse of process, given the circumstances in which his presence in the United Kingdom had been achieved. Outside the United Kingdom, the practice in other States continued in different directions, sometimes confirming the old position of *male captus, bene detentus*,⁵ sometimes the reverse.⁶

What the practice did show was the diversity of situations in which cases of this kind arose. At one end of the spectrum was abduction of the accused by agents of

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1. For example, *Sinclair v. HM Advocate* (1890) 17 R.(J.) 38; *R. v. Officer Commanding Depot Battalion, RASC Colchester*, ex p. *Elliott* [1949] 1 All E.R. 138.

2. *R. v. Bow Street Magistrates*, ex p. *Mackeson* 75 Cr.App.R. 24.

3. *R. v. Plymouth Justices*, ex p. *Driver* [1985] 2 All E.R. 681.

4. *R. v. Horseferry Road Magistrates' Court*, ex p. *Bennett* [1993] 3 All E.R. 138.

5. For example, *United States v. Alvarez-Machin* 504 US 655 (1995).

6. For example, *S v. Ebrahim* 1991 (2) SA 553, on which see Dugard, "No Jurisdiction over Abducted Persons in Roman-Dutch Law: Male Captus, Male Detentus" (1991) 7 South African Journal of Human Rights 199. For an extensive survey of the case-law, see G. Gilbert, *Transnational Fugitive Offenders in International Law* (1998), pp.337-377.